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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1333

DONALD A. RADO,

Petitioner,

v.

STATE OF CONNECTICUT AND JOHN MANSON, COMMISSIONER OF CORRECTION,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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NO.

DONALD A. RADO,

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STATE OF CONNECTICUT AND JOHN MANSON, COMMISSIONER OF CORRECTION,

RESPONDENTS.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The petitioner Donald A. Rado prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, rendered on October 3, 1979, reversing the decision of the United States District Court for the District of Connecticut and dismissing petitioner's application for a writ of habeas corpus. The district court had reversed petitioner's Connecticut state court convictions of conspiracy, robbery and burglary and had ordered petitioner's retrial or release from custody.

OPINIONS BELOW

The opinion of the court of appeals is reported at 607 F.2d 572 and is attached as Appendix A. The opinion of the district court is unreported and is attached as Appendix B. A preliminary ruling on petitioner's motion for bond in the district court is reported at 435 F.Supp. 349. Petitioner's convictions were originally affirmed by the Connecticut Supreme Court in an opinion reported at 172 Conn. 74, 372 A.2d 159 and attached as Appendix C.

JURISDICTION

The opinion of the court of appeals was rendered on October 3, 1979, and Rado's petition for rehearing was denied on January 4, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Was petitioner denied his constitutional right under the Sixth and Fourteenth Amendments to confront the witnesses against him by the prosecutor's use of a co-defendant's hearsay statements, when the co-defendant refused to testify on Fifth Amendment grounds concerning the truth or falsity of the statements or petitioner's alleged involvement in the crimes charged?

2. Did the prosecutor's deliberate and repeated elicitation at petitioner's trial of a co-defendant's invocation of his Fifth Amendment privilege on ques-

tions concerning petitioner's alleged involvement in the crime charged deprive petitioner of his constitutional right to due process of law and confrontation, as guaranteed by the Fifth, Sixth and Fourteenth Amendments?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the Constitution of the United States provides in pertinent part, as follows:

> No person shall be ... deprived of life, liberty or property without due process of law.

The Sixth Amendment to the Constitution of the United States provides in pertinent part, as follows:

> In all criminal prosecutions, the accused shall enjoy the right to ... be confronted with the witnesses against him.

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part, as follows:

> No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property without due process of law.

28 U.S.C. §2241 provides in pertinent part, as follows:

a. Writs of habeas corpus may be granted by the Supreme Court, any justice thereof, the district courts and any circuit judge within their respective jurisdictions. The order of a circuit judge shall be entered in the records of the district wherein the restraint complained of is had.

....

c. The writ of habeas corpus shall not extend to a prisoner unless --

....

(3) He is in custody in violation of the Constitution or laws or treaties of the United States;

28 U.S.C. §2254 provides in pertinent part, as follows:

> a. The Supreme Court, a Justice thereof, a Circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

STATEMENT OF THE CASE

I. STATEMENT OF THE FACTS

In December 1972, Donald A. Rado stood trial in Connecticut Superior Court at Waterbury on charges of conspiracy, robbery and burglary, stemming from a robbery of a Waterbury woman at her home the previous July. Rado was not accused of having actually committed the offenses charged, but was alleged to have participated in the planning of the crime. Rado had been arrested on the basis of statements given by three men who, subsequent to arrest on other charges, had confessed to the robbery and claimed Rado was also involved. The three, Sean Donnelly, Wayne Epprecht and Fred Hall, pled guilty to involvement in the crime prior to Rado's trial and were expected to be the State's principal witnesses against Rado.

Donnelly and Epprecht both testified at trial that they and Hall had planned the robbery at Rado's home on July 2, 1972, the day before the crime was committed. This testimony was directly refuted by two defense witnesses, Rado's wife and his next door neighbor, who testified that Donnelly and Epprecht had not been at the house that day [T. 731, 843]*.

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*References to the trial transcript are denoted by the symbol "[T.]". Although the record on appeal includes only the transcript of Hall's testimony, the Court of Appeals relied upon the trial transcript in its opinion.

Donnelly and Epprecht also testified that they had had further discussion with Rado concerning the crime the next day, July 3, 1972, at Rado's home. This testimony was, however, seriously weakened by Donnelly and Epprecht's inability to agree on the time of day they arrived at Rado's house [T. 162-3, 254], the manner in which they got there [T. 218, 254], and their activities earlier that day prior to their alleged visit to Rado's home [T. 160, 268]. Donnelly's testimony was additionally impeached by an inconsistent statement he had given to the police concerning disposal of the guns used in the robbery [T. 203-4] and by his admission that he was a former drug addict who had been using drugs in July 1972 [T. 230]. Epprecht's credibility received a staggering blow when, after the defense produced documents contradicting his testimony, he was recalled by the prosecutor and admitted he had committed perjury concerning his prior contacts with the Waterbury area [T. 853-4].

The defense admitted that Donnelly and Epprecht had been at Rado's house for a short time on July 3, 1972 [T. 735, 738, 770], but produced evidence contradicting their claim of having planned the robbery with Rado on that day [T. 754-67].

Given this less than compelling evidence by Donnelly and Epprecht of Rado's culpability, the testimony of

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(Footnote page 5, continued)
Petitioner, therefore, presents a full statement of the case based upon the entire trial transcript.

Fred Hall, the third admitted perpetrator, took on critical significance. Hall was older than Donnelly and Epprecht, had known Rado for a number of years, and could either confirm or deny Donnelly and Epprecht's account of Rado's involvement in planning the crime on July 2 and 3, 1972.

Hall, however, refused to testify concerning the details of the robbery. During his testimony, he repeatedly attempted to invoke his Fifth Amendment privilege against self-incrimination when questioned concerning his participation in the robbery [T. 360, 366, 372, 375, 377, 378, 380, 381, 382, 383, 389, 395, 396, 397]. Although the trial court overruled Hall's claims of privilege and ordered him to answer the prosecutor's questions [see, e.g., T. 375-77], Hall continued to resist surrender of the privilege on questions implicating himself (and Rado) in the robbery [see, e.g., T. 395-97]. The trial court, in the presence of the jury, declared Hall a hostile witness [T. 369] and subsequently (after excusing the jury) held Hall in contempt [T. 393-94]. Nonetheless, Hall persisted in his refusal to testify concerning the robbery and did not incriminate Rado [T. 395-97].

The issues involved in this appeal arise as a result of the conduct of the prosecutor when confronted with Hall's refusal to testify concerning the crimes charged. In the face of Hall's repeated invocation of the Fifth Amendment, the prosecutor pursued two impermissible lines of examination. First, under the

guise of "refreshing" Hall's recollection, the prosecutor asked Hall whether he "remembered" the statements made by the prosecutor and Hall at the time of Hall's guilty plea [T. 381, 387-92]. Confronting Hall with a transcript of the guilty plea proceedings, the prosecutor read aloud the factual recitation of the offenses stated by the prosecutor at that proceeding and acknowledged by Hall, at that proceeding [T. 388, 390-92]. While Hall admitted at trial that the prior statements had been made [id.], he refused to testify concerning the truth or falsity of the prior statements [T. 389-90], nor would he testify concerning the details of the robbery. Thus, the prior description of the offenses -- which implicated Rado* -- was heard by the jury and could not be subjected to cross-examination by Rado. The remainder of Hall's testimony did not directly implicate Rado.

A second tactic adopted by the prosecutor was equally immune from cross-examination. At the conclusion of Hall's direct examination [T. 395-97] -- after it was abundantly clear that Hall would not testify concerning the details of the robbery -- the prosecutor asked a series of "questions" designed to convey to the jury Rado's involvement in the offenses

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* The prosecutor's description of the offenses had concluded: Prior to driving to the home, this scheme, this plan to commit the crime had been discussed with the conspirators Rado, Donnelly and Epprecht, and Hall [T. 388].

charged;** when, as expected, Hall refused to answer, the questions were withdrawn, leaving Rado no way to refute the inevitable inference the jury would draw against him from the questions and Hall's refusal to incriminate himself. Rado was convicted at trial and was subsequently sentenced to six to twelve years incarceration.

**See pp. 23-24, infra.

II. HISTORY OF THE PROCEEDINGS

Rado's convictions were affirmed by the Connecticut Supreme Court on December 14, 1976. State v. Rado, 172 Conn. 74, 372 A.2d 159 (1976), cert. den., 430 U.S. 918 (1977).

In March 1977, petitioner filed the instant application for a writ of habeas corpus in the United States District Court for the District of Connecticut. Bond pending disposition of the application was established, the court noting the "high probability of success" on the merits of the petition, Rado v. Manson, 435 F.Supp. 349, 351 (D.Conn. 1977), as well as Rado's lack of criminal background. Id. Rado, who was 46 years old, had never been incarcerated before and had no prior felony record. Id.

An evidentiary hearing was held on Rado's claims on October 6, 1977. On October 24, 1978, the court rendered its opinion on Rado's application, upholding Rado's claims of constitutional error in the conduct of his trial, and ordering petitioner's release unless the State elected to retry Rado within 60 days.

The district court's ruling was stayed pending the State's timely appeal to the court of appeals. On October 3, 1979, the court of appeals reversed the opinion of the district court. Rado v. State of Connecticut, 607 F.2d 572 (1979). Rado's petition for rehearing was denied on January 4, 1980.

REASONS FOR GRANTING REVIEW OF CERTIORARI

At petitioner's state court trial, the prosecutor pursued two impermissible lines of examination when confronted with a co-defendant's Fifth Amendment refusal to testify concerning the details of the crimes charged against petitioner. First, the prosecutor read aloud from the transcript of the co-defendant's guilty plea proceedings, asking the co-defendant whether he "remembered" the statements made by the prosecutor and him at that time. While the witness admitted at trial that the statements (which implicated petitioner) had been made, he refused to acknowledge whether the statements were true or false or otherwise testify concerning the details of the crime.

Second, at the conclusion of the same witness' direct examination, after the witness had repeatedly invoked his Fifth Amendment privilege and had been held in contempt of court for his refusal to testify concerning the robbery, the prosecutor asked a series of "questions" designed to convey to the jury the prosecutor's theory of petitioner's involvement in the crime. When, as expected, the witness refused to answer, the questions were withdrawn. The district court concluded, after receiving the prosecutor's testimony at an evidentiary hearing, that the questions were deliberately posed to elicit the witness' Fifth Amendment invocation.

The district court concluded that the prosecutor's use of Hall's prior statements violated petitioner's right to confront the witnesses against him, relying specifically on this Court's holding in Douglas v. Alabama, 380 U.S. 415 (1965). The district court further held that the prosecutor's deliberate questioning of the witness in a manner designed to elicit the witness' invocation of the Fifth Amendment privilege on critical issues at trial constituted prosecutorial misconduct in violation of petitioner's right to due process of law, as suggested in Namet v. United States, 373 U.S. 179 (1963).

The court of appeals reversed on both grounds. Although recognizing that the facts of this case are virtually identical to those presented in Douglas, the panel ruled that Douglas does not compel reversal of Rado's convictions. The court held that Douglas does not apply since Hall's hearsay statements against Rado were not the "sole" evidence of guilt, as in Douglas, and were thus not "crucial" or "devastating." This surprising conclusion was reached without benefit of the entire trial transcript, (which was not before the court) and in the absence of any such argument by the State (which had specifically declined any harmless error claim). In fact, Hall's hearsay statements added critical weight to the inconsistent testimony of the two other admitted perpetrators.

The court of appeals further held that Douglas was inapplicable because Hall was "available" for cross-examination --

a conclusion wholly belied by Hall's refusal to answer any questions concerning the robbery or the hearsay statements at issue. In fact, Hall was held in contempt of court for his refusal to follow the trial court's orders to answer such questions.

Finally, the court of appeals concluded that Hall's hearsay statements contained sufficient indicia of reliability to satisfy constitutional requirements for admissibility. Hall, however, did no more than acknowledge the "substantial" accuracy of the prosecutor's factual summary at the guilty plea proceedings. The statements were not under oath and were, in fact, made at a time when Hall stood to reduce his sentence by cooperating against Rado [JDZ 11,22]*. Moreover, neither the prosecutor's remarks, nor Hall's concurrence at that time contained sufficient detail to lend internal assurances of reliability.

The court of appeals' opinion substantially modifies this Court's holding in Douglas v. Alabama, supra, and calls into question the continued vitality of that decision. This case presents an opportunity for the Court to clarify the present viability of Douglas as well as to explicate further the interplay of availability of the declarant and reliability and cruciality of the hearsay evidence in the determination of when the

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*Reference is to the testimony of Jacob D. Zeldes, Esq., Hall's attorney, at the evidentiary hearing.

admission of hearsay constitutes a violation of the Confrontation Clause. See Dutton v. Evans, 400 U.S. 74 (1970).

The court of appeals also rejected the district court's reliance on a Namet violation as a basis for reversal of Rado's convictions. In Namet v. United States, 373 U.S. 179 (1963), the Court suggested that a prosecutor's deliberate elicitation at trial of a witness' invocation of his Fifth Amendment privilege would constitute reversible error. While the Namet principles were elevated to constitutional level in Douglas v. Alabama, 380 U.S. at 419-20, the Court has not since Namet articulated the parameters of the Fifth and Sixth Amendment violations at issue or the standards for lower court review of such claims. This case presents an appropriate factual record on which to do so.

Hall invoked his Fifth Amendment privilege nineteen times during the course of his direct examination by the prosecutor, often in response to questions previously asked and unanswered. At the conclusion of Hall's direct examination, when his refusal to testify concerning the robbery was well-established, the prosecutor asked a series of final questions designed to convey his theory of Rado's involvement in the crime. The questions were recitative in nature, inflammatory in syntex, and, coming at the end of Hall's testimony, dramatic in impact. The questions were withdrawn when, as expected, Hall invoked his privilege. The district court, which received the prosecutor's testimony at

the evidentiary hearing below, specifically concluded that the questions were asked in order to elicit the witness' invocation of the privilege.

The court of appeals' holding that no prosecutorial misconduct occurred as a result of this questioning by the prosecutor is contrary to the explicit finding by the district court and in conflict with opinions from other circuits. See e.g., Robbins v. Small, 371 F.2d 793 (1st Cir. 1967); United States v. Mayes, 512 F.2d 637 (6th Cir. 1975). The facts of this case provide a basis for the Court to explicate the constitutional dimensions and articulate guidelines and standards for review of Namet claims.

Rado, who has never before been incarcerated and, at age 46, has no prior felony record, was convicted at trial in large part because of the prosecutor's conduct during Hall's testimony. A writ of certiorari should be granted to review and reverse the convictions obtained through such unfairness.

I. THE COURT SHOULD GRANT A WRIT OF CERTIORARI TO REVIEW THE COURT OF APPEALS' SUBSTANTIAL MODIFICATION OF DOUGLAS V. ALABAMA AND CLARIFY THE CONTINUED VIABILITY OF THE CONFRONTATION CLAUSE PRINCIPLES AFFIRMED IN THAT DECISION.

The facts of this case and the court of appeals' holding call into question the continued viability of this Court's holding in Douglas v. Alabama and more generally the interplay between hearsay rules and the Confrontation Clause that has troubled this Court on numerous occasions. See, e.g., Dutton v. Evans, 400 U.S. 74 (1970); Parker v. Randolph, ____U.S.____ (1979).

As the court of appeals recognized, the facts of this case are virtually identical to the facts of Douglas v. Alabama, 380 U.S. 415 (1965), where the Court reversed a state prisoner's conviction because the prosecutor had employed an accomplice's prior inculpatory statement in exactly the way Hall's prior statements were used at Rado's trial.

Indeed, the parallels between the facts of Douglas and the instant case are striking. As with Hall in the instant case, Loyd, the accomplice in Douglas, had been found guilty at a prior proceeding and was called to testify by the state, prior to sentencing, at a co-defendant's trial. As in the instant case, the accomplice attempted to invoke his Fifth Amendment privilege, was overruled by the trial judge, and ordered

to answer questions concerning the crime charged. As in the instant case, the accomplice persisted in his Fifth Amendment claim, was declared a hostile witness, and was threatened by the court with a contempt citation. As in the instant case, the state prosecutor then produced a prior statement by the accomplice implicating the defendant and "[u]nder the guise of cross-examination to refresh Loyd's recollection" read the statement to the jury, "pausing after every few sentences to ask Loyd, in the presence of the jury, 'Did you make that statement?'" 380 U.S. at 416. Finally, as in the instant case, the genuineness of the accomplice's statement was proven by the state (through the testimony of police officers who had observed Loyd sign it), but the accomplice refused to answer questions concerning the truth of the statement.

In Douglas, the Court held that the defendant's "inability to cross-examine Loyd as to the alleged confession plainly denied him the right of cross-examination secured by the Confrontation Clause." 380 U.S. at 419. The Court recognized that the jury was likely to treat the prosecutor's reading of Loyd's statement as the equivalent of evidence and infer from Loyd's refusal to testify that the admissions in the statement incriminating Douglas were true. Since Douglas had no way to cross-examine Loyd (or the prosecutor) on the statement, and since the statement bore on a fundamental issue in the case, reversal of Douglas' conviction was required. As the Court concluded,

> "Since the [State's] evidence tended to show only that Loyd made the confession, cross-examination ...as to its genuineness could not substitute for cross-examination of Loyd to test the truth of the statement itself." Id., at 419-20 (as quoted in California v. Green, 399 U.S. 149, 163 [1970]).

The court of appeals attempted to distinguish the holding in Douglas on three grounds: first, on the ground that Hall's statements were not "crucial" to the State's case; second, on the ground that Hall was, in fact, available for cross-examination; and third, on the ground that Hall's prior statements were inherently reliable. Each of these grounds is unfounded.

a. "Cruciality"

The panel's conclusion that Hall's hearsay statements were not crucial is unsupportable.* Rado did not dispute the testimony of Donnelly and Epprecht, the

*In its opinion, the panel drew at length on the trial transcript to justify its conclusion that Hall's hearsay statements were not crucial to the State's case. Such reliance on the transcript calls into question the fairness of these proceedings, since the entire trial transcript was never introduced below or made a part of the record on appeal. The reason the entire transcript was not introduced is especially significant: in the district court, the State conceded

two young co-conspirators, that they had been to his house on the day of the robbery, but did dispute their allegations that he had planned the robbery with them that day and the day before. Two defense witnesses directly refuted Donnelly's and Epprecht's claim that they had been at Rado's house the day before the crime [T. 843, 731], and the State's case was further weakened by serious inconsistencies in Donnelly's and Epprecht's testimony, most notably as to the time of day they were at Rado's house [T. 162-3, 212, 254-5], the manner in which they got to Rado's house [T. 218, 254], and their activities earlier in the day [T. 160, 268]. Donnelly's testimony was additionally undermined by an inconsistent statement he had given to the police concerning disposal of the guns used in the robbery [T. 203-4], and Epprecht's credibility was completely demolished by his subsequent admission of perjury when recalled by the State to explain documents produced by the defense contradicting his testimony concerning his familiarity with Waterbury and prior presence in Connecticut [T. 853-4]. Indeed, the trial court charged the jury that it could disregard Donnelly's testimony in its entirety because of the perjury [T. 945-6]. In addition, Donnelly and Epprecht's accomplice testi-

(Footnote page 18, continued)
that if error had occurred in the reading of Hall's plea transcript, it could not be deemed harmless. Thus, in the district court, only the transcript of Hall's testimony was introduced as an exhibit.

mony was, of course, subject to careful scrutiny under any circumstances [T. 948-50 (charge on accomplice testimony)].

Under such circumstances, Hall's corroboration of Rado's involvement in planning the crime took on critical importance. Hall was older than Donnelly and Epprecht, had known Rado for a number of years, and could, the State apparently believed, give the lie to Rado's claim that Donnelly and Epprecht were innocently at Rado's house at Hall's request on the day of the crime and not there the preceding day. The corroboration the State sought was not, however, forthcoming from Hall, but was supplied, impermissibly, by the prosecutor when he read his and Hall's prior statements aloud. In particular, this recitation concluded with the prosecutor's reading:

> Prior to driving to the home, this scheme, this plan to commit the crime had been discussed with the conspirators Rado, Donnelly and Epprecht, and Hall. [T. 388]

Hall's hearsay statements were clearly of significant weight to the State's case against petitioner.

b. Hall's "availability" for cross-examination.

The panel also held that, unlike the declarant in Douglas, Hall was, in fact, available for effective cross-examination concerning the veracity of his extra-

judicial statements. This holding is wholly belied by the trial transcript.

At the outset of his testimony, Hall specifically stated that "I would like to reserve my right not to answer certain questions that I don't feel as though I want to answer [T. 360]," and as the panel opinion concedes, "Hall never answered any questions concerning the details of the robbery." 607 F.2d at 850. On numerous occasions, Hall refused to answer questions, even though ordered to do so by the court, forcing the prosecutor to withdraw his questions [T. 386, 389, 395-97, 408, 410, 412]. On several other occasions, Hall "complied" with the court's order by furnishing a plainly evasive or unresponsive answer [T. 380, 381], ultimately prompting the trial court to hold Hall in contempt, the court stating:

> Mr. Hall, time and again this Court has ordered you to respond to certain questions. Your attitude has been one of defiance and disregard of the Court's order. I am going to find you in contempt.
>
> Sheriff, I want this man held in contempt.
>
> [T. 394]

Given Hall's persistent assertion of his Fifth Amendment privilege, it would have been foolhardy, indeed, for petitioner's trial counsel to attempt cross-examination on the prior statement. Had

Hall continued in his refusal to testify about the robbery or the truth of the prior statement, the damaging effects of the statement would have been re-emphasized before the jury, without opportunity for refutation.

Furthermore, the panel was clearly in error in holding that Hall's admission that he made the prior statement rendered Hall available for cross-examination. In Douglas, the state presented three law enforcement officers to testify Loyd had made the statement at issue. The Court expressly rejected such evidence as a substitute for cross-examination on the truth of the statement itself:

> Nor was the opportunity to cross-examine the law enforcement officers adequate to redress his denial of the essential right secured by the Confrontation Clause. Indeed, their testimony enhanced the danger that the jury would treat the Solicitor's questioning of Loyd and Loyd's refusal to answer as proving the truth of Loyd's alleged confession. But since their evidence tended to show only that Loyd made the confession, cross-examination of them as to its genuineness could not substitute for cross-examination of Loyd to test the truth of the statement itself. 380 U.S. at 419-20.

c. The "Reliability" of Hall's Statements.

Nor did Hall's prior statements contain any substantial indicia of reliability. The description of the offenses set forth at the guilty plea proceeding was recited in the words of the prosecutor, not Hall, acknowledged by Hall only as "substantially correct and accurate," and elicited at a time when Hall knew that cooperation with the State against Rado would result in a lesser sentence [JDZ 11, 22]. The statements contained little, if any, detail so as to render them internally reliable, cf., Harris v. United States, 403 U.S. 373 (1971); Draper v. United States, 358 U.S. 307 (1959), and as statements against penal interest, were in any event subject to special scrutiny. United States v. White, 553 F.2d 310, 313 n. 4 (2d Cir. 1977); Advisory Committee Note to Federal Rules of Evidence 804(b)(4). Indeed, because of the unreliability of such statements, the Connecticut state courts have refused to allow a hearsay exception for statements against penal interest. See Tait and LaPlante, Handbook of Connecticut Evidence, §11.6, p. 196; State v. Stallings, 154 Conn. 272, 287-8, 224 A.2d 718 (1966); State v. Mosca, 90 Conn. 381, 97 A. 340 (1916).

Petitioner recognizes that since Douglas was decided, this Court has had occasion to discuss at greater length the interplay between the hearsay rules and the Confrontation Clause. Parker v. Randolph, supra; Dutton v. Evans, supra; California v. Green, supra. While the factors cited by the court of appeals

have been suggested in recent decisions, the panel's opinion constitutes a substantial modification of Douglas unsupported by controlling case law. Moreover, to the extent the panel ruled Hall was "available" to testify despite his ascertion of a Fifth Amendment privilege, the opinion is clearly in conflict with the law in other circuits.

The facts of this case thus present the Couft an opportunity to clarify the continued viability of Douglas after Dutton v. Evans, supra, and to establish the factors to be considered by lower courts in assessing hearsay and Confrontation Clause violations.

II. THE COURT SHOULD GRANT A WRIT OF CERTIORARI TO ARTICULATE THE DUE PROCESS AND CONFRONTATION CLAUSE PRINCIPLES IMPLICATED BY A PROSECUTOR'S DELIBERATE ELICITATION OF A WITNESS' INVOCATION OF THE FIFTH AMENDMENT PRIVILEGE.

In Namet v. United States, 373 U.S. 173 (1963), this Court recognized that a witness' invocation of his Fifth Amendment privilege in the presence of the jury at a criminal trial could lend critical weight to the case against a defendant and unfairly influence a jury to convict on the basis of inferences not subject to cross-examination. The holding in Namet suggested that a prosecutor's intentional elicitation of a witness' privilege would constitute misconduct. 373 U.S. at 186-87. Although the Court has subsequently acknowledged the constitutional basis of the Namet holding, Douglas v. Alabama, 380 U.S. at 419-20, the Court did not in Namet -- and has not in the seventeen years since Namet was decided -- articulate the prerequisites for a constitutional violation or the standards for lower court review of such claims. This case presents an appropriate factual record on which to do so.

During the course of his testimony, Hall invoked his Fifth Amendment privilege against self-incrimination nineteen times in attempts to avoid answering questions concerning his participation and Rado's alleged involvement in the robbery. He was repeatedly pressed for answers by the prosecutor and trial

court, was declared a hostile witness, and was permitted to engage in colloquies with the court over his attempt to avoid self-incrimination. All this occurred in the presence of the jury. Finally, at the end of Hall's direct examination, after Hall had been held in contempt of court and taken into custody "for his defiance and disregard of the Court's order [T. 394]" to answer questions concerning the robbery, the prosecutor propounded four questions clearly designed to summarize for the jury the prosecution's theory of Rado's involvement in the crime; the questions were all withdrawn when Hall invoked his privilege:

> Q. Mr. Hall, did you plan at Mr. Rado's home on the afternoon of July 3, 1972, with Epprecht and Donnelly, together with Mr. Rado, to rob Mrs. Hyman?
>
> The Witness: If your Honor please, I refuse to answer the question on the grounds that it might tend to incriminate me.
>
> Mr. McDonald: I won't press the question.
>
> By Mr. McDonald:
>
> Q. In your presence were firearms given to Epprecht and Donnelly at the home of Donald Rado?
>
> The Witness: If your Honor please, I refuse to answer the question on the grounds that it might tend to incriminate me.

> Mr. McDonald: I won't press that question.
>
> By Mr. McDonald:
>
> Q. Were the walkie-talkies given to these men or to Donnelly and to you by Mr. Rado to perpetrate this armed robbery against Mrs. Hyman on that day?
>
> The Witness: If your Honor please, I refuse to answer the question on the grounds that it might tend to incriminate me.
>
> By Mr. McDonald:
>
> Q. Can you see the home of Mrs. Hyman from the back porch of Mr. Rado's house?
>
> The Witness: If your Honor please, I refuse to answer the question on the grounds that it might tend to incriminate me.

[T. 395-397]

All this occurred even though the prosecutor had been informed prior to trial that Hall might invoke his Fifth Amendment privilege if called as a witness and had agreed to honor the privilege if invoked by Hall [JDZ 12-13].

After hearing the prosecutor's testimony at the evidentiary hearing below, the district court specifically concluded that the final series of questions was asked solely to have the jury hear Hall's

refusals to testify. The district court found an intentional violation of Rado's due process rights in such conduct and reversed Rado's convictions.

Notwithstanding these facts, the panel reversed, finding no misconduct or due process violation. The panel opinion upholding the prosecutor's conduct at trial stands in marked conflict with the decisions of the other circuits, both as to the existence of prosecutorial misconduct and as to the resulting due process violation. Robbins v. Small, 371 F.2d 793, 795 (1st Cir. 1967); United States v. Mayes, 512 F.2d 637, 650 (6th Cir. 1975); United States v. King, 461 F.2d 53, 56-57 (8th Cir. 1972); United States v. Coppola, 479 F.2d 1153, 1160 (10th Cir. 1973).

Even if the prosecutor was originally justified in calling Hall and questioning him in the jury's presence, but see San Fratello v. United States, 340 F.2d 560, 565 (5th Cir. 1965); United States v. Edwards, 366 F.2d 853, 870 (2d Cir. 1966), there can be little doubt that the prosecutor's questions at the end of the examination were deliberately designed to induce the jury to draw an inference of Rado's involvement in the crime. The questions were propounded after Hall had been held in contempt for refusing to answer incriminating questions as directed by the court, without any attempt to discover, or reason to believe, that Hall's well-established silence would be abandoned. The questions were recitative in nature, inflammatory in syntex, and, coming at the end of the questioning,

dramatic in impact. Furthermore, no attempt was made to pursue the questions once Hall invoked his privilege, nor was the series of questions discontinued when it became clear that Hall would not answer.

In upholding the prosecutor's conduct, the panel completely disregarded the finding of fact by the district court, based upon the testimony it received at an evidentiary hearing, of the prosecutor's improper motive in asking the questions. The panel also disregarded the consistent decisions of the other circuits condemning a prosecutor's continued examination of a witness once the witness' intention not to answer on Fifth Amendment grounds is apparent. In Robbins v. Small, 371 F.2d at 795, the First Circuit reversed a state prisoner's conviction because of just such conduct by the prosecutor, stating:

> When it became apparent to the prosecutor that this witness was broadly claiming the privilege, basic fairness required that he discontinue his leading questions. Yet he persisted with at least six even more damaging ones, which by this time he knew or certainly should have known the witness would not answer.

As the Robbins court observed, it made no difference that the prosecutor did not initially know the witness would refuse to testify. Id. at n.11.

Similarly, in United States v. King, 461 F.2d at 56, the Eighth Circuit condemned a prosecutor's continued questioning of various witnesses after their intentions to rely upon their privilege became clear, holding,

> "The government's motives must be viewed disapprovingly in light of its persistence in questioning these witnesses once it knew of their intentions not to testify, and particularly in asking questions which would be certain to elicit the privilege against self-incrimination. This was no minor lapse of judgment."

In King, the court reversed the defendant's conviction even though the trial court had given a cautionary instruction to the jury to draw no inference from the invocation of the privilege. Id. at 57 n.4.

As the Tenth Circuit has also remarked, reversing a conviction for the same reason in United States v. Coppola, 479 F.2d at 1160:

> The ruling in Namet goes no further than to allow the government to call a witness so as to give that witness an opportunity to answer particular questions. It does not stand for allowing the prosecution to ask various and sundry questions which are certain to produce a claim of privilege and to give rise to an atmosphere of guilt.

See also United States v. Mayes, 512 F.2d at 650 ["The extensive nature of the questioning after determining that the witness would continue to invoke the privilege was, in any event, an unfair trial tactic on the part of the prosecution"].

The panel also failed to consider the deliberately repetitive nature of the prosecutor's questioning. Thus, for example, Hall was asked on two occasions about the view from Rado's porch [T. 396, 412] and on two occasions about the walkie-talkies used during the robbery [T. 396, 401]. Each time he refused to answer. Similarly, he was asked twice about seeing firearms at Rado's house [T. 381, 396], invoking his privilege both times. After refusing to answer if he was at Rado's house on July 3, 1972 [T. 378], he was later asked why he went to Rado's house on that day [T. 408]. The repetitive nature of the questioning unnecessarily insured that the prejudicial impact of the witness' claim of privilege would not dissipate and also highlighted for the jury the key areas of prosecutorial interest in Hall's "testimony."

Equally important as the number of questions asked, the entire tenor of Hall's direct examination was likely to influence the jury adversely. Hall was repeatedly mocked by the prosecutor [T. 379, 381, 393] and accused of untruthfulness [T. 409] in the presence of the jury, even though the prosecutor subsequently stated, outside the presence of the jury, that he believed Hall to have

been truthful [T. 414]. Hall was declared a hostile witness by the court in the jury's presence [T. 369], and his repeated attempts to invoke his privilege were often met with summary rejection by the court [T. 378, 381, 382-83]. Hall's request to speak with his attorney was rejected by the court, in the jury's presence [T. 377]. Furthermore, the trial court failed to give any curative instruction limiting the prejudicial impact of Hall's invocations of the privilege.

The facts of this case clearly establish the prosecutor's deliberate elicitation of a co-defendant's Fifth Amendment privilege to prejudice the jury's finding of guilt or innocence. The panel opinion upholding such conduct is in conflict with the law in the other circuits. The Court should grant certiorari to reverse the panel opinion and clarify the constitutional principles implicated by such prosecutorial misconduct.

CONCLUSION

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

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CERTIFICATION

This is to certify that a copy of the foregoing has been sent to Robert E. Beach, Jr., Esq., Assistant State's Attorney, P. O. Box 5000, Wallingford, Connecticut this 4th day of February, 1980.

/s/ DAVID S. GOLUB
DAVID S. GOLUB